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Supreme Court, U.S.
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No. 04-405

IN THE

Supreme Court of the United States

MARGARET HUDSON,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE, MIDDLE DIVISION

BRIEF IN OPPOSITION

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STATEMENT OF TENNESSEE PROCEEDINGS[1]

This action arose out of Petitioner's installation of vinyl siding on an investment property that she owned within a historic preservation district. The guidelines for the historic preservation district prohibit the installation of vinyl siding onto the houses within that historic district. Petitioner acknowledges that her investment property is located within the district and that she violated the zoning overlay by installing vinyl siding.

Petitioner's house is located at 2208 White Avenue Nashville, Tennessee, within the Woodland in Waverly Historic Zoning District (hereinafter the "Historic District"). (R. 183). It is an investment property for her. (R. 80-1).

The Metropolitan Council adopted the Historic District in 1985 (hereinafter the "1985 Ordinance").

The following measures were taken to notify and hear the public before the Woodland in Waverly Historic District and guidelines were adopted:

- May 1983 Metropolitan Historical Commission Director Shain Dennison spoke at a public meeting in the neighborhood.

1. Petitioner Margaret Hudson will be referred to as "Petitioner." The Metropolitan Government of Nashville and Davidson County will be referred to as the "Metropolitan Government." The Tennessee Court of Appeals will be referred to as the "Tennessee Court of Appeals" or "Court of Appeals." The Petition for a Writ of Certiorari will be referred to as the "Petition." Citations to the Record will be made in one of two ways. Those items that are included as appendices to the Petition will be referred as (Petition, Appendix __, __). Citations to items not so included in the Petition, will be made to the Record on file with the Clerk of the Tennessee Supreme Court and designated as (R. __).

- May 1983, the Metropolitan Historic Zoning Commission (MHZC) mailed an information packet on historic zoning to all residents and owners in proposed district, including draft guidelines, explanation of historic zoning, etc., asking for input. The mailing announced a June 13, 1985 public hearing on the proposed zoning.

- On June 13, 1985 a public hearing was held to discuss the proposed historic district.

- The recommendation of the MHZC that the neighborhood be designated a historic district took place in a public meeting of the MHZC on June 27, 1985.

- On August 14, 1995, the Metropolitan Planning Commission approved the designation.

- The Metropolitan Council held a duly advertised public hearing on the historic designation of the Woodland in Waverly district on November 5, 1985.

- The guidelines for the district were adopted in a public meeting of the MHZC on November 25, 1985.

- Public notice of the district ran in the local daily newspaper, "The Tennessean," on November 27, 1985.

(R. 128-130).

In addition, notices that the neighborhood had been designated a historic preservation district were distributed by the Woodland in Waverly Neighborhood Association in December 1985, after the district was adopted. (R.129). These notices described the procedure for how to apply for a certificate of appropriateness before changing the exterior of a house in this neighborhood. (R. 129).

The Mayor signed the ordinance on November 25, 1985, and pursuant to its terms, it took effect five days later on November 30, 1985. (Supp. R. 3, 11).

The Historic District has specific design guidelines relating to modifications of historic structures in the overlay district. (R. 183-4). Sections II.B(6)(c)(1) and (4) prohibit the installation of vinyl siding on structures within the district. (Petition, Appendix D, 20a).

Petitioner failed to obtain a certificate of appropriateness prior to modifying the exterior of the house by installing vinyl siding in 1996. (R. 84, 183).

After the siding was installed, Petitioner applied to the staff of the MHZC for a certificate of appropriateness. The staff denied the application. (R. 183). Petitioner then appealed the staff's decision to the MHZC. The MHZC denied the appeal on April 16, 1997. (R. 184). Petitioner did not appeal the denial of the MHZC. (Petition, Appendix D, 21a).

Petitioner has not removed the vinyl siding, even though a certificate of appropriateness was never granted. (R. 184).

The Metropolitan Government filed suit to enforce the design guidelines on February 10, 1998. (R. 1-4). Petitioner did not attack the alleged procedural irregularities in the adoption of this Historic District until she filed her Answer in 2000, 15 years after adoption of the overlay. (R. 52-54).

The Metropolitan Government filed a Motion for Summary Judgment on June 19, 2002. (R. 60-62). The Trial Court granted summary judgment on November 7, 2002. (Petition, Appendix C, 15a-16a).

Petitioner appealed the grant of summary judgment on November 14, 2002. (R. 217-218). The Court of Appeals ruled, in a per curiam opinion, in favor of the Metropolitan Government on December 30, 2003. (Petition, Appendix B, 2a).

The Court of Appeals determined that even if there was insufficient notice to Petitioner of the adoption of the historic preservation overlay, Petitioner's decision to wait 15 years to challenge the adoption immunized it from a procedural attack. (Petition, Appendix B, 9a-10a).

The Tennessee Supreme Court denied Petitioner's Application for Permission to Appeal from the decision of the Court of Appeals. (Petition, Appendix A, 1a).

SUMMARY OF ARGUMENT

The Metropolitan Government did not deny Petitioner procedural due process of law under the Fourteenth Amendment for the following reasons:

- Petitioner's case falls within the framework of the *Bi-Metallic* analysis and not the *Londoner* rule.

- In passing the 1985 Ordinance, the Metropolitan Government acted in a legislative manner to increase the size of the Historic District by 72 properties, bringing its size toe 157 parcels. Petitioner was not singled out in any fashion.

- The 1985 Ordinance was not directed at a few individuals.

- Petitioner was not exceptionally affected by the 1985 Ordinance. She was not threatened with the imminent loss of the property or of her rights to the property. Her continued use of the property was not changed by the 1985 Ordinance.

Therefore, Petitioner did suffer a deprivation cognizable under the Due Process Clause.

The Tennessee rule of repose applicable to challenges to zoning ordinances on procedural grounds as applied by the decision of the Tennessee Court of Appeals does not violate the Supremacy Clause of the United States Constitution. In enacting the statute that became 42 U.S.C. § 1983, Congress omitted any language of limitation or repose. Therefore, the ruling of the Tennessee Court of Appeals is

not contrary to any provision of 42 U.S.C. § 1983. Moreover, the use of a reasonable state statue of limitation or rule of repose to limit a cause of action brought under 42 U.S.C. § 1983 is fully consistent with federal policy. *Wilson v. Garcia,* 471 U.S. 261, 271 (1985).

The violations of state laws requiring notice over and above the publication of the 1985 Ordinance as found by the decision of the Tennessee Court of Appeals were random and unauthorized acts so a pre-termination hearing was impractical. As such, they were not acts that deprived Petitioner of any right under procedural due process so long as Tennessee law provides an adequate post termination remedy. *Hudson v. Palmer,* 468 U.S. 517, 532-33 (1984). Tennessee law provided such remedies in the form of the right to appeal from the denial of the variance by the Historic Zoning Commission and by inverse condemnation if Petitioner wished to claim a regulatory taking of her property.

REASONS FOR DENYING THE PETITION

A. Petitioner was not Denied Procedural Due Process of Law under the Fourteenth Amendment.

Petitioner asserts a procedural due process claim under the Fourteenth Amendment due to procedural flaws in the adoption of the 1985 Ordinance. Petitioner bases her claim on the Metropolitan Government's failure to provide her with individual notice of a public hearing held prior to the Metropolitan Council's adoption of the 1985 Ordinance and on the failure to publicize the guidelines prior to its consideration by the Metropolitan Council. For purposes of summary judgment only, the Metropolitan Government conceded the issue of individual notice even though there is

still a contested issue of fact as to whether Petitioner or her late husband signed a petition in favor of the expansion of the Historic District. (Petition, Appendix D, 20a).

The Tennessee Court of Appeals found that the Metropolitan Government failed in two respects to provide Petitioner with the individual notice required by M.C.L. § 17.40.710 prior to the adoption of the 1985 Ordinance. (Petition, Appendix B, 9a). First, the Metropolitan Government mailed the notice of the hearing on the guidelines to the address of Petitioner's property in the proposed expanded Historic District, but not to her actual residence that was outside that district. The Tennessee Court of Appeals found that the address of Petitioner's residence was available to the Metropolitan Government in its property tax records. (*Id.*). The second failure noted by the Tennessee Court of Appeals was that the Metropolitan Government did not mail the notice of the hearing in a timely fashion so that it would arrive 21 days prior to the date of the public hearing, as also required by M.C.L. § 17.40.710. (*Id.*). Therefore, the Tennessee Court of Appeals found that the Metropolitan Government violated the notice requirements established by local ordinance and, by implication, the requirement for reasonable notice imposed by T.C.A. § 13-7-406. (Petition, Appendix B, 8a-9a). The Tennessee Court of Appeals noted Petitioner's claim regarding the tardy publication of the guidelines, but made no finding other than to assume it was true for the sake of argument. (Petition, Appendix B, 10a). There was no contested issue regarding the adequacy of the notice to the public at large prior to the adoption of the 1985 Ordinance. Likewise, the Tennessee Court of Appeals made no findings regarding the Due Process Clause of the Fourteenth Amendment, so the only violations it found were restricted to Tennessee law.

By this time it is well settled that a violation of a state procedural regulation or statute by itself does not necessarily constitute a violation of the guarantee of procedural due process conveyed by the Fourteenth Amendment. *Engle v. Isaac,* 456 U.S. 107, 119-121 (1982). Otherwise, a state would fall under a federal due process obligation to follow all of its procedures thus creating an unmanageable situation for the federal courts. *Purisch v. Tennessee Tech. Univ.,* 76 F. 3d 1414, 1423 (6th Cir. 1995), *quoting Levine V. Torvik,* 986 F.2d 1506, 1515 (6th Cir. 1993), *cert. denied,* 509 U.S. 907 (1993). This principle of law applies equally to matters involving real property rights. *Brody v. City of Mason,* 250 F.3d 432, 438 (6th Cir. 2001). Therefore, Petitioner has to demonstrate that the violations of which she complains rise to a level that implicates the Fourteenth Amendment in addition to Tennessee law.

There is no dispute that the issues of proper notification to Petitioner arose in the context of legislation that increased the size of the existing Historic District by 72 properties to reach a total of 157 properties in all. Generally speaking, the procedural arm of the Due Process Clause of the Fourteenth amendment does not apply to adoption of a statute that affects more than a "few people." *Bi-Metallic Inv. Co. v. State Board of Equalization,* 239 U.S. 441, 445 (1914). An exception to this general principal arises when an ordinance places an exceptional burden on a relatively small number of people. *Londoner v. Denver,* 210 U.S. 373, 385 (1908). Neither of these decisions offered a precise definition of the terms "few people" or relatively small number of people so that task has been left to courts in succeeding cases. Speaking for the Seventh Circuit, Judge Posner has described the more recent analytical framework in zoning cases to the effect that due process does not apply "when zoning decisions are

confined to a legislative body rather than a judicial body." *Indiana Land Company, LLC v. City of Greenwood,* 378 F.3d 705, 710 (7th Cir. 2004). The rationale being that legislative action is generally broader in scope than a proceeding that is targeted on a specific individual. (*Id.*). In an earlier decision, the Seventh Circuit applied the legislative-judicial analysis to affirm dismissal in a case where the legislative bill was prophylactic in nature and arguably aimed at preventing single proposed development and in the face of a claim of state law violation. *Pro Eco, Inc. v. Bd. of Commissioners of Jay County, Indiana,* 57 F.3d 505, 513 (7th Cir. 1995). In both of these cases, the Seventh Circuit relied on the analysis in *City of Eastlake v. Forest City Enterprises,* 426 U.S. 668, 672-677 (1976). In *Eastlake,* the Court considered an unusual situation in which the grant of a zoning variance to a single entity was subject to approval by the town's citizens by referendum and found that even though the referendum disapproved the variance, the Due Process Clause was not implicated. The Sixth Circuit follows a similar analytical process. *Brody v. City of Mason, Id.* 250 F.3d 437-38.

In an effort to meet the "small number of people" prong of the *Londoner* analysis, Petitioner cites the decision from the Ninth Circuit Court of Appeals that applied due process requirements to zoning legislation. *Harris v. County of Riverside*, 904 F.2d. 497, 501-502 (9th Cir. 1990). However, the facts in *Harris* were quite unique. The challenged legislation was actually an amendment to a pending zoning ordinance that affected plaintiff and one other landowner who actually requested the amendment. (*Id.*). Further, the amendment effectively eliminated the commercial use that plaintiff made of his land. (*Id.*). It was no surprise then that the Court found that the amendment to the zoning ordinance

singled out the plaintiff and exceptionally affected his property interest on an individual basis. (*Id.*). Therefore, the Court found that although the original version of the ordinance was duly published, there was virtually no notice of the amendment, much less the individual, actual notice that the Court believed was required by the Due Process Clause under the *Londoner* analysis. *Harris v. County of Riverside,* 904 F.2d 503-504. Needless to say, the undisputed facts in the instant case are far different than those in *Harris.* Although Petitioner complains of the timing of the adoption of the administrative guidelines, there is no dispute that the Metropolitan Government published the 1985 Ordinance. Moreover, Petitioner's property was one of 72 parcels added to the Historic District, so she was not specifically targeted.

More recent decisions from the Ninth Circuit show that its reasoning process is close to that employed by the Seventh and Sixth Circuits. In *Halverson v. Skagit County,* 42 F.3d 1257, 1258, 1260-61 (9th Cir. 1995), the facts are more analogous to the instant case in that ninety residents sued the county claiming that its system of levees and dikes caused increased flooding to their homes. One of their causes of action was that the county violated the procedural arm of the Due Process Clause by failing to provide them individual notice of the legislative acts that established the system of levee's and dikes. (*Id.*). The Court upheld a summary judgment dismissing that claim stating that the character of the county's action was legislative in nature in that it involved land use covering a sizable area and was not targeted to one or a few individuals. (*Id.*) Thus, it did not give rise to due process considerations. (*Id.*). *See also Hotel & Motel Association of Oakland v. City of Oakland,* 344 F.3d 959, 968-70 (9th Cir. 2003). Therefore, the Ninth Circuit's analytical framework for determining whether to analyze a

case under the *Bi-Metallic* or *Londoner* rulings is not markedly different from that used by the Sixth and Seventh Circuits.

In order to meet the "exceptionally affected" prong of *Londoner*, Petitioner relies on a line of cases beginning with *Mullane v. Central Havover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), and culminating with *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 797-799 (1983). However, a careful reading of those cases demonstrates that they do not apply to her situation or support her argument. As the Court explained in *Mennonite*, a common thread in the precedents that it examined is that the owners of the property interests were faced with an immediate and drastic effect to their property due to the initiation of a specific proceeding. *Mennonite Board of Missions v. Adams,* 462 U.S. 795-798. Whether it be by court action to settle a trust account, initiation of condemnation actions, or as in *Mennonite* itself, a sale of property for back taxes that directly threatened the mortgagee's interest, the process potentially eliminated the property interests of the various plaintiffs. (*Id.*). Therefore, the Court determined that notice *in rem* was an insufficient guarantee of due process as not reasonably calculated to apprise the owner of the property interest of its peril, particularly in view of the fact that the addresses of the plaintiff in each case was reasonably available in public documents. *Mennonite Board of Missions v. Adams,* 462 U.S. 798-99.

The impact of that common thread of immediate and drastic impact was demonstrated in a decision by the Eleventh Circuit that also addressed the interests of a mortgagee who was apparently also the property owner. *Zipperer v. City of Fort Myers,* 41 F.3d 619, 623-24 (11th Cir. 1995), *certiorari*

denied, 516 U.S. 807 (1995). The municipal action in *Zipperer* consisted of a special assessment for property improvements that resulted in a tax lien that subordinated the mortgagee's lien. (*Id.*). After closely examining *Mennonite*, the Court reasoned that, although the plaintiff had a constitutionally protected property right, due process did not require actual notice because the plaintiff did not face an immediate and drastic threat to his property interest. (*Id.*). Instead, as the landowner, he retained his significant ownership interest as well as the reduced priority of his lien, albeit at a higher cost. (*Id.*). In reaching its decision, the Court relied on a similar analysis in a case from the Fifth Circuit, *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610, 614 (5th Cir. 1991). (*Id.*). Likewise, Petitioner in the instant case may face higher costs to maintain her property as a result of the 1985 Ordinance, but she cannot demonstrate that she was thereby subject to an immediate and drastic effect such as the complete loss of her property interest. Just as the plaintiff in *Zipperer*, she retained the ownership of her property upon the enactment of the 1985 Ordinance. Therefore, Petitioner cannot satisfy the "exceptional burden" requirement of the *Londoner* rule. Moreover, the ruling in *Mennonite Board of Missions v. Adams* does not require actual notice to Petitioner in order to satisfy the procedural arm of the Due Process Clause. The publication of the pendent 1985 Ordinance that the Metropolitan Government unquestionably provided was sufficient.

Throughout her arguments on due process, Petitioner appears to assume that the Due Process Clause applies to her due solely to her ownership of her property. However, as the Court clearly stated in *Mennonite*, it is the degree of threat to that ownership interest that triggers the protection of the procedural branch of the Due Process Clause. Simply put,

Petitioner has not suffered a deprivation of her property interest sufficient to invoke the Due Process Clause. Petitioner attempts to demonstrate such a deprivation by inferring that historic zoning districts impose such restrictions that they border on confiscatory measures. Suffice it to say that Petitioner has not presented facts to show that the 1985 Ordinance even approaches that level of restrictions. This Court has long recognized that all zoning interfere with an owner's use of property, but that alone is insufficient to invalidate a zoning ordinance. *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668, 673, n.8 (1976).

B. The Rule of Repose Invoked by the Tennessee Court of Appeals does not implicate the Supremacy Clause.

The Metropolitan Government, of course, does not dispute Petitioner's claim that the United States Constitution is the law of the land and through the Supremacy Clause, prevails over contrary state law. However, the decision of the Tennessee Court of Appeals did not fly in the face of the Supremacy Clause.

This Court has stated that its analysis of the application of the Supremacy Clause, "start[s] with the assumption that the historic police powers of the states [are] not to be superceded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Unless Congress explicitly states its intent to pre-empt all state laws on a particular subject, state law is only pre-empted to the extent it actually conflicts with federal law. *Pacific Gas & Elect. Co. v. State Energy Resources Conservator & Development Comm'n.*, 461 U.S. 190, 204 (1983).

Petitioner poses her argument as if any state action to limit a claim brought under 42 U.S.C. § 1983 for violation of procedural due process frustrates the Congressional purpose in its adoption and thus, violates the Supremacy Clause. That simply is not the law. In reaching its holding that state statutes of limitation for personal injury actions should apply to claims brought under 42 U.S.C. § 1983, the Court observed that, "A federal clause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985), *citing Adams v. Woods*, 2 Cranch 336, 342 (1805). In a frequently quoted passage, this Court described the basis for its decision to apply a state statute of limitation for personal injury claims to claims under 42 U.S.C. § 1981 as follows:

> Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of state ones.... In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the state's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1976).

The Court also stated that federal court should not show any "special reluctance" to apply state law. (*Id.*).

As Petitioner asserts, the Metropolitan Government did not plead the statute of limitations; however, as this Court

has stated, the general purposes and principles of all statutes of repose are the same. *Goodman v. Lukens Steel Company, et al.*, 482 U.S. 656, 664-65 (1987).

The ruling of the Tennessee Court of Appeals amounts to nothing more than a statute of repose. That Court found that public policy dictates that after a long period of acceptance, of at least ten years, that there can be no challenge to a law based on any alleged procedural flaw in its adoption. (Petition, Appendix B, 9a-10a). In reaching that conclusion, the Court relied on precedents in Tennessee and at least four other states. The logic and rationale underlying that decision is precisely the same as that which underlies the decisions in *Wilson v. Garcia*; *Johnson v. Railway Express Agency, Inc.*; and *Goodman v. Lukens Steel Company, et al.*, as quoted above. Thus, its decision is not inconsistent with federal law.

Petitioner cites the Tenth Circuit case of *Carter v. City of Salina*, 773 F.2d 251, 254 (10th Cir. 1985) for the proposition that a zoning ordinance that does not comply with state procedural notice requirement is void and subject to attack at any time. It was a diversity case that apparently relied on Utah law. (*Id.*, 773 F.2d 252). However, five years later the Tenth Circuit upheld another challenge to a zoning ordinance from Utah where plaintiffs could have known about the ordinance for 17 years through publication and actually knew of it for nine years before filing suit challenging the procedure used in its adoption. *Thatcher Enterprises v. Cache County Corporation, et al.*, 902 F.2d 1472, 1475-76 (10th Cir. 1990). The *Thatcher* court distinguished its earlier ruling in *Carter v. City of Salina* because that the plaintiffs in that case lived outside of Utah and could not possibly receive notice by publication of the ordinance. In reaching its decision in *Thatcher*, the Court cited at least three of the same cases

relied upon by the Tennessee Court of Appeals and eloquently stated its reasoning to the effect that

> Whether the reason is called laches, estoppel, waiver or public policy, challenges to the procedural validity of a zoning ordinance and constitutional based thereon must be brought within a reasonable time from enactment of the ordinance. If not brought in a timely manner, the plaintiff will be barred from challenging the zoning ordinance.

(*Id.*). In the instant case, Petitioner resided in Nashville in 1985 and not some other state. Petitioner's reliance on *LaSalle National Bank v. City of Evanston*, 179 N.E.2d 673, 675-76 (Ill. 1963) is similarly misplaced because the challenge in that case went to the *substance* of the zoning ordinance, not to the procedure by which it was adopted. Thus, it is irrelevant to the instant case. Illinois follows much the same rule as Tennessee in procedural challenges. *Smith v. City of MaComb*, 352 N.E.2d 697, 703 (Ill. Ct. App. 1976).

The policy of the State of Tennessee, applicable to challenges to zoning ordinances, as stated by the Tennessee Court of Appeals, does not conflict with 42 U.S.C. § 1983, and complies with federal policy to the extent that there must be some limitation to the right to bring procedural challenges to the adoption of statutes. Moreover, Tennessee's policy is fully consistent with the majority rule among the states. There is no need for the Supreme Court to consider this matter.

C. Petitioner had Adequate Post Deprivation Remedies under Tennessee Law.

In the event a court determines that the procedural arm of the Due Process Clause applies to a case, it still must find that state law does not provide an adequate remedy before allowing recovery. *Hudson v. Palmer*, 468 U.S. 517, 532-33 (1984). In the event that a deprivation of due process was caused by a random, unauthorized, negligent or intentional act of a state employee so that a pre-deprivation hearing is impracticable, then due process is satisfied if the state provides an adequate post-deprivation remedy. (*Id.*). The random and unauthorized act cannot be the result of a state law or established procedure. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982). Further, a pattern of practice of such acts, in violation of state law, will not fall into the category of a random or unauthorized act because a pre-deprivation hearing is possible in such a situation. *Zinerman v. Burch*, 494 U.S. 113, 135-37 (1990).

Petitioner claims that the decision of the Tennessee Court of Appeals means that she has no remedy under Tennessee law. However, she overlooks at least two remedies that were available to her. In 1997, the Historic Zoning Commission denied her request for a variance of the guidelines adopted under the 1985 Ordinance. (R. 184). At that point, Tennessee law provided her an appeal to a court of record through common-law certiorari. (T.C.A. § 27-9-101, *et seq.*) Although such appeals are confined to the administrative record, the court reviews whether the administrative body's action was arbitrary or capricious. *Hoover, Inc. v. Metro Bd. of Zoning Appeals*, 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996).

Constitutional issues may also be raised in such a proceeding, *Willamette Industries, Inc. v. Tennessee Assessment Appeals Commission*, 11 S.W.3d 142, 150-51 (Tenn. Ct. App. 2000), and attorney fees are recoverable if authorized by law. *Wimley v. Rudolph*, 931 S.W.2d 513, 516-17 (Tenn. 1996). It is impossible to know how Petitioner would have fared under such a proceeding, but the courts might have looked more favorably on her case had she expeditiously sought a remedy.

The other remedy available to Petitioner would be for inverse condemnation for damages under T.C.A § 29-16-123 for a regulatory taking. *Davis v. Metropolitan Gov't*, 620 S.W.2d 532, 534 (Tenn. Ct. App. 1981).

The failures on the part of the Metropolitan Government to provide notice were obviously random, unauthorized violations of state law. Staff personnel at the Historic Zoning Commission, most likely overlooked the requirements and failed to follow through but even if the oversight was intentional, it makes no difference. There is nothing in the record to indicate that the failure was part of any policy or practice of misconduct. Therefore, the undisputed facts bring this case within the category of random and unauthorized acts.

Tennessee law provided Petitioner with at least two potential post-deprivation remedies against the Metropolitan Government. Therefore, there has been no deprivation of procedural due process of law.

CONCLUSION

For the reasons stated above, the Metropolitan Government respectfully submits that it did not deprive Petitioner of any right guaranteed by the Due Process Clause of the Fourteenth Amendment; that the decision of the Tennessee Court of Appeals did not violate the Supremacy Clause and that Tennessee law provided adequate post-deprivation remedies. Therefore, the Metropolitan Government respectfully requests this Court to deny the Petition.

Respectfully submitted,

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